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CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

9:39 am, Dec 21, 2020

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

UNITED STATES OF AMERICA, . Criminal No.:2.13-CR-00607-JFB-AYS  
.  
Vs. .  
. 100 Federal Plaza  
. Central Islip, NY 11722  
PHILLIP A. KENNER, .  
. December 10, 2020  
. . . . .

TRANSCRIPT OF HEARING (Telephonically)  
BEFORE HONORABLE VISITING JUDGE JOSEPH F. BIANCO

APPEARANCES:

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I N D E X

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1 THE CLERK: Calling Criminal Case 2013-607, United  
2 States of America versus Phillip Kenner. Counsel, please state  
3 your appearances for the record.

4 MS. LEONARDO-BECKMAN: For the United States of  
5 America Diane Leonardo, Assistant United States Attorney.  
6 Along with me is Madeline O'Connor.

7 THE COURT: Good afternoon.

8 MR. BRISSENDEN: Good afternoon, Your Honor --

9 THE COURT: Go ahead.

10 MR. BRISSENDEN: Matt Brissenden, standby counsel for  
11 Phillip Kenner.

12 MR. KOSTOLAMPROS: For Danske Bank this is George  
13 Kostolampros of Venable. My colleagues Doreen Martin, Xochitl  
14 Strohbehn and Kelly Weiner are on the line as well.

15 MR. WOLINSKY: Good afternoon, Your Honor, this is  
16 Marc Wolinsky, spokesperson for (indiscernible - connection).

17 MS. RAMACHANDRAN: Good afternoon, Your Honor, this  
18 is Seetha Ramachandran for Owen Nolan.

19 MR. MccSOUTHER: Good afternoon, Your Honor, Tom  
20 MccSouther on behalf of Diamante (phonetic).

21 THE COURT: All right, good afternoon, everybody,  
22 this is Judge Bianco. As you know I've scheduled this  
23 conference after the Court's oral ruling with respect to some  
24 of the issues in the bank's summary judgment motion. I did  
25 receive the letters that we had discussed first from Mr.

1 Kostolampros on November 30, the Government's on December 7,  
2 and then a reply letter on December 9. I also received Ms.  
3 Ramachandran's letter with respect to Mr. Nolan that was I  
4 think filed earlier today, which I'd like some time to discuss.

5           So I would just ask that if you're not speaking, and  
6 since you're on mute because there seems to be a lot of  
7 background noise. I know there's a lot of people on the line  
8 so just check to make sure your phone is muted so that we don't  
9 have trouble hearing everybody.

10           Before I have a discussion with the lawyers I just  
11 want to clarify the Court's ruling. Obviously there was a back  
12 and forth in the papers, not just with respect to potential  
13 amounts that are still in dispute, but also with respect to the  
14 scope of the Court's ruling that the Court wants to address.

15           I think the most fundamental issue and I just want to  
16 clarify is with respect to the additional loans. It was not my  
17 ruling that the only portion of that with respect to whether it  
18 was an arms length transaction, my ruling was not limited to  
19 the period after the protective order was put into place. I  
20 certainly made reference to that contrary, I think I used the  
21 word including that period. If I misspoke at any point, I  
22 apologize for that.

23           But it was not my intention to suggest that that  
24 would be the only period of time for which the Government could  
25 argue that. Obviously the Government's argument with respect

1 to that is different for that time period as they pointed out  
2 multiple times. It's April 2014, their argument for that time  
3 frame, that (indiscernible - connection) no new monies  
4 (indiscernible) to pay down the facility fee and re-borrow at  
5 at anytime. I guess that's why there's a focus on that time  
6 period, but I was not suggesting that this was not  
7 (indiscernible) make an argument and/or could not seek  
8 discovery with respect to the additional loans acquired for  
9 that time period.

10 So that's probably the most important clarification I  
11 needed to make. The other one that the Government noted, I  
12 guess I misspoke. At one point I made reference to, with  
13 respect to the initial loan the amount that, the difference  
14 between \$101,240,922 and \$107,538,328. I guess there was  
15 another reference to a different amount that I made during the  
16 course of the ruling of I think of \$100 million  
17 (indiscernible) that is the scope of the dispute of the initial  
18 loan.

19 So before I get to your issues regarding the  
20 discovery and some of the other things regarding documentation  
21 about certain amounts, and I know Mr. Kostalampros was anxious  
22 to make the point that the bank believed my ruling to be, the  
23 bank was taking the position that a lot of those other disputed  
24 amounts may be in the bank's view moot and would withdraw those  
25 particular amounts since they would not be material in light of

1 the bank believes the property is worth.

2 But I don't believe, given the Court's current  
3 ruling, that that would be, obviously it would not be true.  
4 There's a lot more money that is in dispute. And the  
5 Government's view if they were to prevail with (indiscernible)  
6 some portion of the additional loans that the Court shouldn't  
7 even recognize the \$101 million because their argument would be  
8 that any money then that was used to pay down the additional  
9 loans (indiscernible) -- the Court would determine it's not a  
10 bona fide (indiscernible) the bank (indiscernible) value at  
11 that point would then be deducted from the bank's claim with  
12 respect to the initial loan. So in other words it does not  
13 appear to me that (indiscernible) somehow sever that out and  
14 recognize a partial claim.

15 So that's sort of I think the global issues that,  
16 before I go through with particulars, Mr. Kostalampros, do you  
17 want to be heard on that?

18 MS. STROHBEHN: Judge Bianco, I, this is Xochitl  
19 Strohbehn, I think Mr. Kostalampros has been bounced. He'll be  
20 rejoining --

21 MR. KOSTOLAMPROS: No, no, I'm sorry. I was on mute,  
22 I apologize.

23 THE COURT: That's all right.

24 MR. KOSTOLAMPROS: I'm sorry, Your Honor. There was  
25 a little bit of background noise, so I think I got everything

1 that you said, the clarification. Obviously, you know, we  
2 viewed it that you had taken a position on post bill of  
3 particulars. So for us it would be very important to get  
4 clarification as to what is recognized.

5 Frankly, you know, there's still a significant amount  
6 taking into account the original Facility A, and the amount  
7 remaining at the Facility A, as well as the PPN. Taking those  
8 amounts alone gets you well over \$100 million. And we  
9 recognize the Government has made this argument that  
10 essentially they would claw back amounts that were repaid, used  
11 to repay Facility B and Facility C and apply it to Facility A.

12 We see nowhere in the law that that is allowed. You  
13 know, we haven't found one case that would support such a  
14 theory here. You know, it's one thing to say look, we're not  
15 recognizing your claim because you weren't a BFP, but it's  
16 another thing to say, you know, we're going to claw back  
17 amounts that you will repay on different loans. And it's, you  
18 know, it bears reminding the Court and the parties here is, you  
19 know, the amounts that they claim are revolvers, these are all  
20 revolvers where principals were given an advance, and then the  
21 same principal was repaid over time.

22 And these revolvers, going back to the original  
23 Facility B and then Facility C, were implemented at a time  
24 period in which but for those revolvers there would have been  
25 no sales as the resort. So you know, the point being is that



1 those amounts shouldn't be at issue as to what gets assessed at  
2 Facility A. What all that that issue is, is Danske's claim.  
3 And that claim right now is just essentially three facilities  
4 and the BFN (phonetic) and the PPF (phonetic).

5 And it's one thing to say look, you know, we don't,  
6 they claim that we weren't a BFP as to amounts advanced-post,  
7 the initial Lehman loan, I guess, or the acquisition of the  
8 Lehman loan. But it's another thing to apply amounts that were  
9 repaid as to those loans to another separate loan.

10 And again, Your Honor, I ask the question, you know,  
11 where is there any support for such a period? We have not seen  
12 one.

13 THE COURT: Well, let me just, that issue has only  
14 come up in the past, you know, week or so since these rulings.  
15 But I'm just a little confused about, you're suggesting that if  
16 that theory were rejected as a matter of law, then we're  
17 combining in the initial loan and the interest on that initial  
18 loan, and I guess the \$45 million for the (indiscernible) you  
19 think that might be enough to moot out everything else where  
20 there's not, all the other issues with respect to the  
21 additional loans with the, potentially at least moot, is that  
22 what you're suggesting to me?

23 MR. KOSTOLAMPROS: I am suggesting today, Your Honor.  
24 We would have to confirm that with our client, but I can tell  
25 you right now our client doesn't believe that. And again I

1 have to go back to confirm it, but I don't believe we believe  
2 that there's any value that even gets you to that amount.

3 THE COURT: All right, let me just ask the Government  
4 about the PPF because again I wasn't specifically focused on  
5 every individual item. But the bank has suggested in their  
6 response to the Government's letter that even the Government's  
7 accountant does not, in light of the Court's ruling with  
8 respect to the initial loan, that the only issue with respect  
9 to the PPF would be the difference between \$45 and \$50 million.  
10 And that's from the Government. Is that correct or incorrect?  
11 Obviously in light of the Court's ruling.

12 MS. LEONARDO: Your Honor, this is AUSA Leonardo.  
13 I'm having a very hard time hearing everybody. I don't know  
14 what the background noise is, but it's really, if everybody  
15 could mute again if they're not speaking.

16 THE COURT: Yes, I'm hearing some background noise  
17 too. Again, I'm emphasizing everybody on the call other than  
18 the person speaking should be on, have their phone on mute.

19 MS. LEONARDO: Right. So with regards to PPF, I  
20 believe the \$45 million, I don't believe that would be  
21 contested. We are contesting the \$5 million. And in response  
22 to what was said earlier with regard to the monies that would  
23 be attributed to Facility A, if what discovery can show is that  
24 the other facilities are not, the monies attributed to those  
25 are not arms-length transactions, it would be our argument that

1 those should have been outside Facility A instead of, you know,  
2 we've argued in our summary judgment brief in a letter we  
3 submitted the other day that, you know, by allowing the non-  
4 arms-length transactions it was exceeding the value of the  
5 resort and those funds should have been applied to Facility A.

6 And I think the PPF was also calculated on, there was  
7 supposed to be a percentage. And I don't believe we ever got  
8 those documents.

9 THE COURT: Yes, well, on the issue of whether or  
10 not, he says it's a matter of law, there's support for that  
11 type of clawback, I guess, among, with respect to the initial  
12 loan. So you know, I don't think anybody briefed that  
13 particular legal issue for the Court in connection with it.  
14 You can correct me if I'm wrong, is that brief anywhere in the  
15 summary judgment papers? I don't remember seeing that.

16 MS. LEONARDO: I believe we had discussed what the  
17 amounts should be, but I don't believe we briefed it in terms  
18 of any applicable case law on this.

19 THE COURT: All right. All right, I guess we'll have  
20 to come back to that in a minute. But the other, and I guess  
21 Mr. Kostolampros, depending upon your client's view on that,  
22 the other thing the Court is prepared to do, although you know,  
23 the Government made a number of requests for discovery and  
24 additional documentation and I'm prepared to go through some of  
25 those and discuss those. But I'm not sure if we should do that

1 now or we should try to figure out whether or not, if the Court  
2 would address that legal issue, whether or not the bank would  
3 even want to contest those things.

4 MR. KOSTOLAMPROS: Sure, Your Honor. I mean, our  
5 view on it, it would be very important to have an understanding  
6 of what is recognized. Like I said, because it could moot out  
7 all of those other discovery issues.

8 THE COURT: All right. I want to come back to that.  
9 I do want to, Ms. Ramachandran, now a separate issue that  
10 suggests that the Court is violating their due process, their  
11 client's due process rights by proceeding in the fashion that  
12 it is.

13 Actually before I hear from the bank on that or hear  
14 from the Government, Ms. Ramachandran, I was quite surprised to  
15 receive your letter with that argument in it because you've  
16 been participating in this process for many, many months.  
17 You've made multiple submissions to the Court in writing. In  
18 fact, I went back and I looked, on October, I think it was  
19 October 27 you put in a letter answering, amplifying certain  
20 points that the Government was making in response to the bank's  
21 summary judgment argument. And I heard you orally at the oral  
22 argument on the summary judgment motion.

23 And you can correct me if I'm wrong, but I don't  
24 think at any point in any of your letters to the Court or when  
25 we had oral argument did you say wait a second, Judge, we want

1 to put in our own submissions independent of the Government on  
2 potentially having a superior interest in the bank because of  
3 the money back in 2006 creating a constructive trust.

4 I don't remember you ever alerting to the Court that  
5 it was your desire over those many months that we were briefing  
6 this and then arguing it, that you had a separate argument that  
7 you wanted to raise with the Court prior to the summary  
8 judgment motion being decided.

9 And similarly, at no point did you say Judge, all  
10 this discovery that the Government is getting from the bank,  
11 you want that discovery too, we want to make our own argument  
12 about amounts.

13 So I was quite surprised to get this letter on the  
14 morning of this conference. So can you explain that to the  
15 Court?

16 MS. RAMACHANDRAN: Yes, Your Honor. I think all of  
17 those are fair points. I mean, I certainly want to suggest  
18 that I haven't been participating in these proceedings. But I  
19 do think, I didn't realize until, you know, I saw Danske Bank's  
20 summary judgment motion and the Government's response to it  
21 that their claim was going to, I mean, essentially they were  
22 arguing that they were the senior to any other claim in the  
23 proceeding.

24 Like, I had always anticipated that after this motion  
25 was resolved, you know, it was a fight between the Government

1 and Danske Bank there would be an opportunity for the claimants  
2 to also be heard on their petition. I didn't realize that this  
3 was my only opportunity to do that.

4 And strategically, just as Mr. Nolan's counsel, I  
5 mean, he's a victim here. I didn't want to be in the driver's  
6 seat. Typically victims do look to the Government to sort of  
7 take the lead in these types of matters even when they're  
8 claimants in a forfeiture because ultimately if the Government  
9 reaches a settlement they include the victims and they, you  
10 know, try to make everybody whole.

11 So I never thought that I had to be, you know, the  
12 driver of this proceeding. And then when I heard your ruling,  
13 Your Honor's ruling on November 23 then it became clear to me  
14 that you were recognizing arguments that was, essentially your  
15 ruling was going to obliterate any opportunity we had to  
16 continue this and be heard on our petitions.

17 You know, I didn't, I mean, this could have been my  
18 mistake in not perceiving it that way. I just always thought  
19 particularly from comments that had been made by both the  
20 Government and the Court at earlier proceedings that, you know,  
21 this was a cross motion filed by Danske Bank and the  
22 Government. And then you know, we would also be heard on our  
23 petitions.

24 I recall at one point Your Honor asked the Government  
25 what about these other petitions, and they weren't prepared to

1 set a briefing schedule on that yet because we had just filed  
2 those claims.

3           So you know, that is really the point of my letter.  
4 And I apologize for the lateness, sending it to the Court this  
5 morning. I just had to, you know, read what the other parties  
6 submitted, and then by the time I got it in it was quite late.

7           THE COURT: I don't, I'm not, the lateness of the  
8 letter in terms of, you know, it's not a long letter. But you  
9 know, this issue, the bank, I asked the bank this issue at the  
10 oral argument, and they argued that. I said to the bank, what  
11 about these other claimants, and the bank said our view is our  
12 right and nobody is claiming their rights superior to ours,  
13 you know, we're differently situated and they would have,  
14 they're not even claiming they're superior to our interests.  
15 And even at that point you didn't say to me well, Judge, we are  
16 claiming that we are superior.

17           So I understand that you don't want to be in the  
18 driver's seat and that you were piggybacking on a lot of the  
19 Government's arguments that, you know, were I guess in common.  
20 But on this issue of whether or not a constructive trust was  
21 created back in 2006, that would have been obviously the time  
22 for you to say to the Court well, before you, if you're going  
23 to decide this.

24           But the bottom line is the Court has not, obviously  
25 the bank is trying to get the Court to somehow recognize its

1 claiming and finalize its claims. But the Court hasn't done  
2 that at this point.

3 But Mr. Kostalampros, what's your response to this  
4 suggestion, and if you go back and look at their submission  
5 they did, it is in the petition where they are claiming that  
6 based upon events in 2006 that a constructive trust  
7 (indiscernible) for the bank. I don't know if that's something  
8 you'd like to address.

9 MR. KOSTOLAMPROS: Sure, Your Honor. Yeah, we're  
10 prepared to address that. I mean, first, you know, my  
11 understanding is that between CSL and Ms. Ramachandran's client  
12 Mr. Nolan, they serve essentially two interests. One is equity  
13 holders in an entity that, it holds an interest in an entity  
14 that holds an interest in the resort property.

15 So if you look at the law shareholders in an entity  
16 don't have an interest, a legal interest in a forfeiture  
17 proceeding. So that's one argument there. The second argument  
18 as to a constructive trust, again they argue a constructive  
19 trust has to at least DSL argues it's entrusted trust as to  
20 shares in Baha Ventures. Again, not enough.

21 But even if they had, they're alleging a construct  
22 trust as to the amount that flowed into the resort property,  
23 New York law is clear that a BFP basically cuts their interest  
24 off. BFP has a superior interest. And we have case law, Your  
25 Honor, I'm prepared to cite it to you. It's clear that a BFP



1 is like a bank, it's secured interest is ahead of an equity  
2 holder and a holder of a constructive trust.

3 THE COURT: All right. Well, I think to avoid any,  
4 you know, procedural issues the Court should allow formally, I  
5 guess, allow Ms. Ramachandran or any other claimants who want  
6 to make any arguments with regard to a superior interest to the  
7 bank, to put in opposition to the bank's summary judgment  
8 motion and then give (indiscernible) the law in a reply  
9 (indiscernible). Is that acceptable, Mr. Kostolampros?

10 MR. KOSTOLAMPROS: Yes, Your Honor. I guess one  
11 other question that I have, and it would be relevant, is what's  
12 the Government's view on their interest? You know, on the  
13 cases that we see typically the Government argues that there  
14 isn't an interest here at least as to the equity holders.  
15 What's their view on that?

16 THE COURT: Is the Government prepared to address  
17 that now, or do you want to put in something in writing on  
18 that?

19 MS. LEONARDO: Your Honor, we could address that in  
20 writing.

21 THE COURT: All right. So I'll make the Government  
22 respond at the same time the claimants will, the same dates,  
23 okay. And then this way any issues that any claimants have  
24 with respect to the bank claim or the bank's motion, they can  
25 put it in writing, okay.

1 But I did want to address something in Ms.  
2 Ramachandran's letter which struck me again, and I'm curious of  
3 the Government's response before I hear from the bank. But Ms.  
4 Ramachandran suggests that given the situation, and obviously  
5 the bank is continuing to try to pursue foreclosure, it might  
6 revoke into their claim versus the value of resort. Why hasn't  
7 the Government at all pursued the idea of an interlocutory  
8 sale? That was discussed over a year ago.

9 This Court, I think it was carved out in the  
10 preliminary order of forfeiture to allow that to occur and  
11 putting aside the issue of letting the bank foreclose and, that  
12 that would be then forfeitable interest, I'm not sure why the  
13 Government has not pursued the idea of an interlocutory sale.  
14 Is there a response from the Government on that?

15 MS. LEONARDO: Yes, Your Honor. We haven't pursued  
16 it because we really needed to have an understanding of the  
17 amount of the bank's claim and what was going to be recognized.

18 THE COURT: Explain to me why, wouldn't an  
19 interlocutor sale have kept everybody's interest? An  
20 interlocutory sale doesn't say anything with respect to what  
21 the bank is claiming their interest is, right?

22 MS. LEONARDO: Well, I think if, I think for the sake  
23 of argument if the Court were to recognize the entire amount of  
24 the bank's claim which is, you know, is increasing every day,  
25 then if, there would be no equity and we would not even become

1 involved in an interlocutory sale at that point. So I think we  
2 needed to have some kind of parameters with regard to what the  
3 Court was going to recognize as to the amount of, in loans.

4 THE COURT: And do you mean at this point the  
5 Government is not to the point where they can assess that?

6 MS. LEONARDO: Well, Your Honor, if where we're  
7 headed is that the Court is going to recognize only, you know,  
8 let's say \$75 million or \$100 of the bank's loans, then sure,  
9 then I think that's something that we would pursue, an  
10 interlocutory sale.

11 You know, I just wanted to point out also that you  
12 know, we've discussed with the bank numerous times on how to  
13 proceed with this, and it's changed on numerous occasions, you  
14 know, and I don't even know if they're still, what they're  
15 seeking at this point. You know, we were, and I think we've  
16 addressed it with the Court several times that, you know, we  
17 discussed with the bank about just selling the note and then  
18 literally days later they changed it and wanted an  
19 interlocutory sale.

20 So I guess, you know, it would depend on what the  
21 amount of the recognized claim would be and, you know, if it's  
22 going to be limited then certainly we could discuss an  
23 interlocutory sale.

24 THE COURT: But I guess I just heard Mr. Kostolampros  
25 say what the Government should consider if, in fact, the

1 initial loan and \$45 million of the PPF, and there is no  
2 clawback of the, you know, the additional money that was paid  
3 on the other facilities, the Government should consider whether  
4 or not that would reach the threshold that the bank needs to  
5 reach where it would, you know, the bank would not be pursuing  
6 any of these other issues. And I think they're suggesting it  
7 would not be even in the Government's interest to pursue it.

8           So it's something the Government, because obviously,  
9 you know, that's now a legal issue apart from, you know,  
10 discovery on these other, on these other amounts, unless I'm  
11 missing something.

12           MS. LEONARDO: Well, I think, you know, obviously,  
13 Your Honor, that's something we'd have to discuss. But if the  
14 loan is limited to, I add that up to be about \$130 million, 135  
15 million, the initial loans.

16           THE COURT: No, \$135 million plus the money that was  
17 I guess paid on the other loans. Yes, not being, I don't know,  
18 Mr. Kostolampros, do you want to explain how you get to the  
19 math?

20           MR. KOSTOLAMPROS: Sure, Your Honor. We get to the  
21 math by applying the Facility A, the remaining amount that's  
22 owed under it. Remember, Facility A basically derives from the  
23 original Lehman loan. So there's, what's outstanding is \$90.4  
24 million.

25           The Government takes issue with a couple of things

1 out of that amount. For the first time they didn't raise any  
2 issues with it before but they do now, in their latest letter  
3 is capitalized interest, unpaid interest of \$13.6 million. Now  
4 remember, that was capitalized long before this (indiscernible)  
5 So that was \$13.6 million, that's part of Facility A.

6 And then they also take issue with \$200,000 in  
7 closing costs which their consultant acknowledges went to this  
8 title company. And then they take issue with \$1.6 million that  
9 was advanced literally at the same time that Danske acquired  
10 the loan. So you know, in January of 2009, in acquiring the  
11 loan formally from Lehman, Danske also advanced \$1.6 million.  
12 It's essentially an advance that was required by Lehman, and  
13 that's what Danske advanced.

14 And now they're claiming well, that was post the  
15 initial loan, the acquisition of the Lehman loan. Your Honor,  
16 that's somewhat outrageous. I mean, frankly neither a BFP as  
17 of January 2009, which the Court found we're done. The Court  
18 already found that we were. I mean, what would have changed in  
19 the matter of a day to make Danske not a BFP. And frankly,  
20 Your Honor --

21 THE COURT: But how to do get to the rest of the  
22 money though?

23 MR. KOSTOLAMPROS: Okay, so the rest of the money, so  
24 that's \$90.4 million taking into account the \$6 million that  
25 the Government's consulting took issue with based on the

1 records of Trimex (phonetic). Then the remainder is \$18  
2 million in the revolver Facility B. Again, the revolver  
3 Facility B, Your Honor, and I, let me just look at the time  
4 period here, we're talking about a time period of 2009 to 2014.  
5 So again, that's \$18 million. 90 plus the 18, that gives us  
6 \$118 million.

7           And then you add in the \$45 million, and that gets  
8 you, of the PPF, they acknowledge that their only issue of the  
9 \$45 million is the \$5 million, and they increased from the from  
10 the PPF to 15. So not picking (indiscernible) that \$5 million  
11 increase we have three (indiscernible), the \$90.4 million at  
12 Facility A, \$18 million in Facility B and then the PPF of \$45  
13 million. And that gets you to \$163 million.

14           And Your Honor, it seems like the Government is  
15 acknowledging if we get to that amount then there's no, there's  
16 no equity here. The property should (indiscernible) these  
17 proceedings.

18           MS. LEONARDO: Your Honor, if I could just respond,  
19 just a couple of issues. So with regard to the several amounts  
20 that counsel just mentioned, with regards to the \$1.6 million  
21 that was advanced, that wasn't advanced until February of 2009,  
22 and that was advanced as part of the draw request that was made  
23 by the resort and that was not properly, actually it was not  
24 properly supported by the documentation. The draw was allowed  
25 anyway.

1           And we did contest these amounts previously in that  
2 there's lacking documentation. Those additional amounts were  
3 add-ons by the bank, by Danske Bank, they were not part of the  
4 initial Lehman loan, they came, they were add-ons to the  
5 initial Lehman loans.

6           I understood Your Honor to (indiscernible) the  
7 Government as if we're talking about the initial loan and the  
8 PPF with no clawback, not the additional \$18 million on  
9 Facility B. So by my calculation we're at \$135 million. We  
10 are, there is equity in the resort at that amount.

11           THE COURT: Again, the issue, the 18, the key issue  
12 is the \$18 million on Facility B, is that what you're, is that  
13 the difference that I just heard?

14           MS. LEONARDO: No, well, Your Honor, right, that  
15 would be the \$18 million. And then if there's no clawback,  
16 which as we had indicated, you know, we would like to submit  
17 something in writing or do some research on that issue for the  
18 Court, you know, if it's \$135 million with Facility B taken  
19 out, then sure, there would be equity in the resort.

20           MR. KOSTOLAMPROS: Your Honor, if I may add one  
21 comment. We provided the Court with an appraisal that Danske  
22 had received from JLL and that appraisal was dated in June  
23 2017. We are prepared, you know, to tell the Court and the  
24 parties here that appraisal valued the property at that time at  
25 \$150-I believe-million, a little over \$150 million.

1 But under a forced sale, which would essentially be  
2 an interlocutory sale or a foreclosure, the property was valued  
3 again by JLL at \$96 million. It's our view that given the  
4 situation now, the time period we're in, especially given  
5 COVID, that that amount is significantly less than even that.

6 So the Government is saying that it's, you know, the  
7 \$18 million makes a difference, frankly I don't know what the  
8 basis for that is.

9 THE COURT: All right. Well, I think what we should  
10 do at this point, I think, I do want to give any other  
11 claimants an opportunity to be heard in writing with respect to  
12 the bank's claims. So I'll set a date for that for January.  
13 And then the Bank, the Government will also state its position  
14 with respect to the other claimants on that date. The bank  
15 will reply, and I do want the Government to let the Court know,  
16 this is an important tactical issue, whether or not if the  
17 Court decides against the Government and the other claimants on  
18 these particular issues where the if the Government agrees with  
19 the bank that it would not be pursuing the forfeiture. Because  
20 that obviously is something the Court should know, and I think  
21 if the Government doesn't need more information to make that  
22 decision from where we're out now. Does anybody have any  
23 objection to proceeding in that manner?

24 MR. KOSTOLAMPROS: Your Honor, this is George  
25 Kostolampros again. I don't have any objection to that. But I



1 would be remiss if I'm forgetting to add one other point in our  
2 claim, which we're entitled to, and I don't think the  
3 Government has any argument saying that we're not, is accruing  
4 interest that continues to accrue under a default interest  
5 rate. So even if we take into account that \$90 million, you  
6 know, that also needs to be added to that. We submit to the  
7 Court what that amounts to, applying only Facility A, and again  
8 we think that gets you into this \$150 million range taking into  
9 account the \$45 million of PPF.

10 THE COURT: All right, well, I think in light of what  
11 you're saying, and so that everybody is clear what the bank's  
12 position is going into this additional briefing, I think you  
13 should put in a letter supplementing obviously everything  
14 you've already submitted just as not something new but in  
15 addition, that putting aside the additional loan the bank's  
16 position based upon these various components, that this would  
17 be the amount that the Court should recognize based upon the  
18 initial loan and the interest on the initial loan, and no  
19 clawback, so that everybody is clear as to what the numbers  
20 are, okay.

21 MR. KOSTOLAMPROS: Yes.

22 THE COURT: The only other thing I would say, to the  
23 extent I don't know whether these other amounts, the \$1.6  
24 million and the \$200,000, again I don't know whether those are  
25 ultimately going to be material. But if the bank wants to

1 include those amounts in its claims that's independent of the  
2 additional loans, I would just ask that if you provided, you  
3 know, to the extent the Government says that it lacks  
4 documentation, if you provided documentation to the Government,  
5 then you should provide it to the Court. Or point me, if it's  
6 already been submitted, you know, in the summary judgment  
7 motions, just point me to where I have it already. Because I  
8 may have to, if those things turn out to be material I guess I  
9 would have to see whether or not there is sufficient  
10 documentation to support that they, you know, that it was  
11 substantiated and that it related to the initial loan. Okay?

12 MR. KOSTOLAMPROS: Sure, Your Honor. And we believe  
13 that we've submitted all of these documentation and we're happy  
14 to do so. Just one thing for clarification for us all is  
15 what's sort of the order that you want these letters to come  
16 in, and when?

17 THE COURT: Well, your letter is just going to have  
18 math in it and references to documents I guess that are, that I  
19 already have or you're submitted with it. So you can tell me  
20 when you think you can get that in. And then I was going to  
21 give the Government, any claimants, Ms. Ramachandran and any  
22 claimants to make any opposition they want to make independent  
23 of what the Government has briefed to the Court, or if they're  
24 going to amplify what the Government has briefed. I'll give  
25 them until early January to do that.

1           And then I think you would then reply to their motion  
2 with respect to, and the Government will put in, and on that  
3 same date in early January its clawback theory and any laws to  
4 support that clawback theory. And then you would reply to all  
5 of that some time in January. That's my thinking.

6           Is that okay with everybody? Ms. Ramachandran, is  
7 that okay with you?

8           MS. RAMACHANDRAN: Yes, Your Honor. Thank you.

9           THE COURT: All right. So when do you think you  
10 could put in that letter that has the math in it?

11           MR. KOSTOLAMPROS: Your Honor, we could put that in  
12 next week. So most likely --

13           THE COURT: A week from today?

14           MR. KOSTOLAMPROS: Sure.

15           THE COURT: All right. So let's say December 17.

16 And then let's say January 15 for the Government, the claimants  
17 to put in any opposition to the bank's motion. At that time I  
18 want the Government to respond to what their positions with  
19 respect to the other claimants and their argument, whether  
20 they're taking a position at this point. And that, and on that  
21 date as part of that I want the Government to advise the Court  
22 whether or not the Government believes that if the bank were to  
23 prevail with respect to these amounts of its claim that it  
24 would obviate the need for there to be any additional  
25 litigation with respect to the other portions of the claim

1 because the Government would not be in a position then to  
2 further pursue forfeiture.

3 And then how long do you want to put in your reply,  
4 Mr. Kostolampros? July 15?

5 MR. KOSTOLAMPROS: One week is fine, Your Honor.

6 THE COURT: All right, so not July, I mean January.  
7 January 22. And then we'll have oral argument on that by phone  
8 on January 27 at, let's say 2 p.m.

9 MS. LEONARDO: Your Honor, this is AUSA Leonardo.  
10 Did you also, you wanted the clawback research by January 15  
11 also?

12 THE COURT: Yes.

13 MS. LEONARDO: Okay.

14 THE COURT: All right. And also in the Government's,  
15 to the extent in Mr. Kostolampros' letter to the Court next  
16 week, if obviously the Government is still contesting the \$1.6  
17 million or the \$200,000, on that January 15 date the Government  
18 should explain why that documentation is somehow insufficient,  
19 okay?

20 MS. LEONARDO: Yes, Your Honor.

21 THE COURT: All right. That's all I have. Does  
22 anybody have any other issues?

23 MR. HILL: Your Honor, Chris Hill for CSL Properties.  
24 If Mr. Kostolampros is correct, and I have no reason to doubt  
25 him, and the value of this property drops from an appraised

1 \$150 million to \$90 million depending on whether it's a forced  
2 sale, it seems like it behooves everyone on this call,  
3 including the Court, to try to avoid the forced sale. Is there  
4 any thought that a mediation would be productive?

5 THE COURT: I don't know what to, Ms. Ramachandran  
6 suggested that as well. But what's the bank's view on that?

7 MR. KOSTOLAMPROS: Your Honor, our view is that we  
8 tried this before. I mean, you see the distance, you know, the  
9 Government's discovery request is just a case in point. I  
10 mean, you asked for limited discovery and we've got a discovery  
11 request that's basically over 30 categories of documents. You  
12 know, the last time we did this the Government wouldn't even  
13 recognize our claim and it was like well, what are we even  
14 doing here, we're at that stage.

15 And I just think, you know, what would help us, and  
16 we've told all of the parties this, including speaking to Mr.  
17 Mane (phonetic) and Ms. Ramachandran is, have the Government or  
18 the victims with the Government's blessing come to us and give  
19 us an offer so that we can consider that, and whether we're  
20 even in the ball park.

21 But no one has done that, you know, so we're left  
22 with wasting time and resources for a mediation and the bank is  
23 unwilling to do that given, you know, it went nowhere last  
24 time.

25 THE COURT: I think that's, I'm not going to refer

1 this to the Magistrate Judge at this juncture, in this posture.  
2 I don't think that's going to be fruitful for all of the  
3 reasons that Mr. Kostolampros indicated. But I do think that's  
4 a good suggestion. To the extent that Ms. Ramachandran and DSL  
5 or any other victims are concerned about where this is heading,  
6 my suggestion is you reach out to the Government and explain to  
7 them what your concerns are and see if jointly through your  
8 discussions with the Government you can propose something, some  
9 type of offer to the bank.

10           That's, I think, and then if the bank receives that  
11 offer and thinks that, you know, it's worth them going to a  
12 Magistrate Judge on, or worth further discussions, then I'm  
13 happy to, you know, the Court is here and we're willing to  
14 facilitate any of those, not me, but the Magistrate Judge will  
15 facilitate those discussions.

16           But I think he's right, that the victims in  
17 conjunction with the Government should make an offer to the  
18 bank on how to resolve this potentially more quickly. And it  
19 would be helpful to the bank and it would allow potentially the  
20 victims to get something with respect to their debts in the  
21 resort and their interest in the resort without, you know,  
22 losing everything completely. All right.

23           MS. LEONARDO: Your Honor, I believe, and the third  
24 parties can speak to this, I believe they did reach out to the  
25 bank, it was not interested in discussing anything with the

1 third parties while this proceeding was (indiscernible).

2 MR. KOSTOLAMPROS: Your Honor, that's not, that's not  
3 correct. What we just told you is what we've told the victims,  
4 is look, we would consider any offer. But we think provide us  
5 with an offer that's vetted by the Government so we can  
6 seriously consider it.

7 THE COURT: All right. I think that's a fair  
8 request. The Government should put out an offer and it's in  
9 conjunction with the victims if they're interested in pursuing  
10 that. And then I assume there would be back and forth on that,  
11 and if both side think it would be helpful to have Magistrate  
12 Judge Shields involved once there's an offer out there, then  
13 that will be great. But I think that's a fair request. All  
14 right, anyone else?

15 MR. WOLINSKY: Your Honor, this is Mr. Wolinsky.

16 THE COURT: Yes.

17 MR. WOLINSKY: I appreciate the position you're in,  
18 and I know you appreciate the position that everyone else is  
19 in. And my takeaway from today's conference understandably is  
20 that we have more delay. I'd like to make one suggestion just  
21 to move it down the road to avoid the delay (indiscernible).  
22 If there's going to be an interlocutory sale and the Government  
23 is going to be controlling that sale, if the process that the  
24 Government has to go through to retain someone to administer  
25 the sale, document that retention, claim an order for Your

1 Honor to oversee the sale, I'm sure the bank will have an  
2 interest in overseeing how that sale moves forward.

3           So rather than find ourselves at the end of January  
4 looking at everyone and saying okay, now we have a start to the  
5 process to get an interlocutory sale going, my suggestion is  
6 that the Government now take the steps necessary to be prepared  
7 so that if we find ourselves in January going down the  
8 interlocutory sale road we're not starting from scratch at the  
9 end of January.

10           I make that suggestion in the interest of moving  
11 things along and I know that's been important to you, it's  
12 obviously important to the homeowners and understandably  
13 important to the bank.

14           THE COURT: I understand that point, and it's a good  
15 point, and I assume the Government understands that as well.  
16 So I think it's a good point to raise. But my understanding  
17 is, and maybe I don't understand what potentially could be the  
18 settlement here, my understanding is that there potentially  
19 could be an offer made for the Government and/or through the  
20 victims that would involve the Government not getting in an  
21 interlocutory sale with respect to the properties. But maybe  
22 I'm wrong about that. Is that, Mr. Kostolampros, am I wrong  
23 about that, or is that something that would be on the table?

24           MR. KOSTOLAMPROS: Yeah, Your Honor, I think that's,  
25 from our perspective, yes, that could be on the table. And



1 then also I think from our perspective is the Government I  
2 think is going to address in its brief is look, you know, the  
3 value is at a certain point, the Government should walk away,  
4 just like they said they would on this call. If it reaches a  
5 certain amount there's no net equity there.

6 But I think Mr. Wolinsky raises a great point, is  
7 what is the next step here. And if we find ourselves at the  
8 end of January the moving into an interlocutory sale and  
9 waiting another three months for that, that's why from our  
10 perspective, assuming Danske's research is recognized to a  
11 certain amount, Danske is going to be the largest constituent  
12 here with the largest interest here. Allowing the bank to  
13 foreclose on the property, again subject to the Court's  
14 procedures here, is the most efficient and most effective way  
15 to effectuate a sale here.

16 The Government, and we've argued this now years ago  
17 it seems like, the Government hasn't shown that it can  
18 effectuate a sale of a resort property in Mexico, how long  
19 would it take to do that, or even if it could do that. And  
20 that's why we raised in our letter look, allow us to foreclose  
21 on the property. To the extent any amounts come in that are  
22 above Danske's claims, that goes into the Court's coffers for  
23 determination as to whether there are any other legitimate  
24 claimants, and if not then it goes into the Government's  
25 coffers for distribution ultimately for potentially victims.

1 MS. LEONARDO: Your Honor, we, the United States can  
2 assure the Court that we have taken those steps.

3 THE COURT: All right. I think all these things  
4 obviously should be on the table and I would just remind, and  
5 I'm sure you're aware of this from the bank, that obviously  
6 everybody has the ability to appeal whatever this Court's  
7 ruling is with respect to this. So that's another risk that  
8 the bank takes with regard to this whole litigation. But I'm  
9 sure you're aware of that as well.

10 So I think that I would strongly suggest that Ms.  
11 Ramachandran, DSL's counsel and whoever else wants to, you  
12 know, have a meeting with the Government, discuss the situation  
13 with the Government and propose something that could be  
14 workable to the bank. That is my suggestion, strong  
15 suggestion, all right.

16 MS. RAMACHANDRAN: Thank you, Your Honor, I plan to  
17 do that.

18 THE COURT: All right, thank you, have a good day.

19 MR. KOSTOLAMPROS: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, **TRACY GRIBBEN**, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
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/S/ TRACY GRIBBEN

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DATE: December 11, 2020